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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-474

THE PRINCETON COMMUNITY PHONE BOOK, INC. and JOSEPH M. BOYD,

Petitioners,

v.

FRANK L. BATES, ESQ., *et al.*, individually and as members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Counter-Statement of Issues Involved

1. Is the State-action exemption of the Sherman Act applicable where the action complained of was taken by

the respondent Advisory Committee on Professional Ethics solely in its capacity as an arm of the Supreme Court of New Jersey and pursuant to its delegated authority to implement the court's strong policies concerning the ethical conduct of attorneys practicing in the State of New Jersey?

2. Is an award of damages against the members of the Advisory Committee on Professional Ethics appointed by the Supreme Court of New Jersey warranted under 42 U.S.C.A. §1983 where the members, acting in their capacity as an arm of the Supreme Court, have simply issued an opinion implementing and interpreting a disciplinary rule of the court and where the uncontradicted depositions, interrogatories and affidavits clearly reflected that they at all times acted in good faith?

Counter-Statement of the Case

This case involves allegations by plaintiffs concerning the propriety of an opinion of the members of the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey acting as an arm of the court in fulfilling the court's constitutional responsibility for regulating the practice of law in the State of New Jersey.

The Advisory Committee on Professional Ethics (Committee) is a Committee created, appointed and supervised solely by the Supreme Court of New Jersey to answer, on behalf of the Court, inquiries concerning the application of the Disciplinary Rules of the Court to conduct of lawyers practicing in the State. New Jersey Court Rules 1:19-1 *et seq.*

Plaintiffs annually publish a commercial directory containing listings and advertisements and distribute it to the homes and offices in the Princeton, New Jersey area. Plaintiffs derive their income from charging a fee for the listings and advertisements. In 1973 the Committee received several inquiries from members of the New Jersey bar concerning whether attorneys could ethically purchase such classified listings and advertisements in light of DR-102(A)(5) which restricts the use of listings in telephone directories for advertising purposes (Pet. App. p. 5a). The Committee initially declined to render an opinion, referring the attorneys to a prior opinion and the text of the disciplinary rule. However, when attorneys inquired further, pointing out that unlike the directory of the New Jersey Bell Telephone in which such listings and advertisements are permitted, the directory of the Princeton Community Phone Company is primarily an advertising medium, the Committee issued Opinion 290 concluding that the purchase of a classified listing in an advertising directory such as the Princeton Community Phone Book would be in violation of the restriction against advertisement at that time imposed upon lawyers practicing in New Jersey by the Supreme Court of New Jersey (Pet. App. p. 6a).

After a refusal by the Committee to reconsider, plaintiffs filed a complaint in May 1975 seeking damages, and injunctive and declaratory relief under 42 U.S.C.A. §1983 and 15 U.S.C.A. §1. Subsequently, by notice published in the New Jersey Law Journal of April 22, 1976, the Advisory Committee suspended Opinion 290, pending review of the disciplinary rules by the Supreme Court. On May 31, 1977 the District Court granted summary judgment to the Committee (Pet. App. p. 30a to 37a). On appeal by plaintiffs, the Court of Appeals for the Third Circuit reversed in part and found Opinion 290 violative of plaintiffs' First Amendment rights in light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). However, it found defendant members immune from liability for §1983 dam-

ages and found the *Parker* v. *Brown* State-action exemption of the Sherman Act applicable.

Subsequent to this decision, the Advisory Committee deleted Opinion 290 and its corresponding restraints upon the purchase of a listing from Plaintiffs (Res. App. 1a). Thus, there no longer exists in New Jersey the type of restriction complained of by plaintiffs in this case.

ARGUMENT

The court should deny the Petition for Writ of Certiorari because it does not present any important, far-ranging issues and because the Court of Appeals correctly applied the State-action exemption of *Parker* v. *Brown* and correctly concluded that the members of the Advisory Committee on Professional Ethics were acting in good faith and therefore immune from damages under 42 U.S.C.A. §1983.

The sole issues decided by the Court of Appeals in this case concern the applicability of the State-action exemption of the Sherman Act and the applicability of qualified immunity to a 42 U.S.C.A. §1983 claim for damages to members of a judicial committee appointed and supervised by and acting for the Supreme Court of New Jersey.* Despite plaintiffs' efforts to attribute to the Court of Appeals' decision significant adverse implications and thereby articulate a compelling reason for justifying review by this Court of either issue, it is apparent that there is nothing special or important about the Court of Appeals' decision which requires this Court's further attention. Its decision concerning the applicability of the State-action exemption is fully consistent with the criteria developed by this Court governing that exemption. Further, because the decision is based solely upon the particular facts of this case, it has little if any impact beyond those particular facts. Similarly, the disposition of the immunity issue is based entirely upon a factual determination of good faith. Since plaintiffs do not argue, much less demonstrate, that such factual determination is obviously erroneous, there are no meritorious grounds for review of this issue. *E.g., Berenyi* v. *District Director, Immigration and Naturalization Service,* 385 U.S. 630 (1967).

In any event, the determination by the Court of Appeals based upon the particular facts in this case is patently correct. As most recently articulated by this Court in *City of Lafayette, La.* v. *La. Power & Light Co.,* —— U.S. ——, 98 S.Ct. 1123, —— L.Ed.2d —— (1978), while the State-action exemption first set forth in *Parker* v. *Brown,* 317 U.S. 341 (1943), does not exempt from the Sherman Act all governmental entities simply by reason of their governmental status, it is applicable where the actions of the ertity reflect state policy. Thus, this Court observed:

> ". . . the *Parker* doctrine exempts . . . anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation. . . ." 98 S.Ct. at 1137.

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* Although plaintiffs also raise in their petition the validity of the District Court's dismissal of the State antitrust claim on jurisdictional grounds and its determination that defendants were clothed with absolute judicial immunity from damage claims, it is clear that these issues are not presently before this court since they were not ruled on by the Court of Appeals. *Cf. Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 771, n. 30 (1976); *Calmar S.S. Corp.* v. *United States,* 345, U.S. 446, 456 (1953).

Satisfaction of this requirement does not demand a specific, detailed state authorization, rather the State-action exemption is applicable where it can be shown " 'from the authority given a governmental entity to operate in a particular area, that the Legislature [or in this case the Judiciary] contemplated the kind of action complained of.' " 98 S.Ct. a 1138.

Thus, in *Parker* v. *Brown,* the State-action exemption was applicable to the proration marketing program regulating the marketing of agricultural commodities in California because the entire program, its regulation and enforcement, was found to be adopted, organized and enforced by the State for the sole purpose of implementing express State policy concerning marketing controls. While the exemption was not found applicable in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), and in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), the defendants there claiming the exemptions were essentially engaged in private anti-competitive activity, furthering not public but private policies. In *Goldfarb,* although the State Bar Association had been designated as an agent of the State court for a limited purpose, the particular minimum fee schedule at issue was neither recognized nor required by either the Legislature or the Supreme Court of Virginia. The State Bar, this court observed, had "voluntarily joined in what is essentially a private anticompetitive activity." 421 U.S. at 792. Similarly, in *Cantor* v. *Detroit Edison Co., supra,* defendant, an electric utility regulated by Michigan, could not utilize the State-action exemption for anti-competitive programs which had merely been approved by the state Public Service Commission but which did not reflect any particular State policy affirmatively establishing and implementing such programs.

Closely analogous to this case, on the other hand, is the State activity involved in *Bates* v. *State Bar of Arizona,*

433 U.S. 350 (1977), found by this court to fall within the State-action exemption. Concerning disciplinary action initiated and prosecuted by the State Bar enforcing compliance with a State Supreme Court disciplinary rule restricting advertising by attorneys, the challenged anti-competitive restraint upon advertising was, as recognized by this Court, the affirmative policy of the State Supreme Court. Accordingly, the action by the State Bar implementing this policy, was found to be exempt from the Sherman Act. Although it was noted that the State Bar played a part in the enforcement of the anti-competitive rule, its role was completely defined by the court and in taking the action it did, it was acting as an agent for the court under the court's continuous supervision, implementing the court's affirmative policy.

So too here. The particular anti-competitive action complained of herein was nothing more than an effort by the Committee to properly implement the Supreme Court's affirmative anti-competitive policy set forth in Disciplinary Rule 102(A)(5), a rule which closely parallels that involved in *Bates.* The Committee was created by the Supereme Court of New Jersey solely as an arm of the court to assist it in carrying out its constitutional duty to regulate the practice of law. *N.J. Const.,* Art. VI, §2, para. 3. Unlike the State Bar in *Goldfarb,* the entire function of the Committee, a function it was performing in taking the action complained of herein, is to act for the court and implement its policy concerning such regulations.

That it exists solely for and on behalf of the court is clear. The Supreme Court appoints the members of the Committee, designates the chairman; the Chief Justice appoints the Administrative Director of the Courts who serves as the secretary of the Committee. R. 1:19-1. The Supreme Court directs the jurisdiction of the Committee,

limiting inquiries to members of the legal profession, limiting the scope of review to "proper conduct for a member of the legal profession" and prohibiting any inquiry involving pending litigation. R. 1:19-2. It directs the form of the inquiry and the manner in which the Committee may dispose of the same. The rule specifically requires the Committee to issue a written opinion on any inquiry accepted for consideration. R. 1:19-4. Furthermore, R. 1:19-7 permits the Committee to determine the methods and procedure to be followed in expressing its opinion, but this is specifically subject to the approval of the Supreme Court of New Jersey. Effective April 4, 1977, R. 1:19-8 provides for a petition for review by the Supreme Court of any final action of the Advisory Committee, whether it be the issuance of an opinion or the refusal to accept an inquiry of the publication of an opinion. The Committee expresses no policies other than those of the Supreme Court of New Jersey. Its sole existence is for implementing those policies. With respect to the particular action taken by the Committee challenged by plaintiffs, that action was taken well within its delegated authority and consisted solely of an interpretation of the clearly articulated policy of the Supreme Court against advertisement by lawyers. It is clear, therefore, from the particular facts involved herein, that the issuance of an opinion by the Committee interpreting and implementing an anti-competitive regulation of the Supreme Court constitutes State-action.*

* Plaintiffs' suggestion that this decision will require the application of the exemption to all State agencies ignores the plain fact that the application of the exemption depends upon the particular facts of each case. Whether the doctrine might be applicable for instance to State administrative agencies regulating various professions or businesses will depend in each case upon the particular action complained of, the particular authority delegated to the agency by the State and the nature of the particular policy involved.

Moreover, the Court of Appeals' determination that the individual defendants are entitled to immunity was also proper. Plaintiffs do not assert that if the Committee members' actions were made in good faith, they would not be immune from damages pursuant to 42 U.S.C.A. §1983. *E.g., Procunier* v. *Navarette,* —— U.S. ——, 98 S.Ct. 855, —— L. Ed. 2d —— (1978). As fully set forth in the decision, the depositions, interrogatories and affidavits establish without question that the members of the Committee acted in good faith in issuing Opinion 290. The only possible inference of bad faith could be drawn from the fact that a few of the members of the Committee who participated in the decision had at one time or another some indirect interest in the American Telegraph and Telephone. But, as observed by the Court of Appeals, plaintiffs' directory was of limited circulation; allowing lawyers to purchase listings in the directory would have no direct impact upon AT&T. Moreover, as pointed out by the court, of the 12 members who participate in the opinion, none of whom dissented, seven had no connection with AT&T, including the actual drafter of the opinion who had reached his result entirely independent of the other members (App. Pet. 18a).*

In sum, the decision by the Court of Appeals is controlled solely by the particular facts of this case and involves no important, far-reaching issues. In any event, the decision below was correct. Accordingly, the petition for certiorari should be denied.

* Although plaintiffs appear to object to the issue of good faith being decided on the depositions, affidavits and interrogatories, the facts relied upon by the court are entirely undisputed. Plaintiffs were fully aware of the existence of the issue of good faith and had every opportunity to dispute the affidavits, interrogatories and depositions of defendants concerning that issue. Even now they do not suggest they could present any different proof but merely suggest that the trier of fact might have reached a "less favorable" conclusion. This assertion is hardly sufficient to warrant a review by this court of the factual ruling by the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Excerpt of New Jersey Law Journal, July 27, 1978

NOTICE TO THE BAR OPINIONS 290 AND 298 WITHDRAWN

In view of the opinion filed on June 23, 1978, by the U.S. Court of Appeals for the Third Circuit in The Princeton Community Phone Book, Inc. v. Bate, it is necessary for this committee to reconsider its earlier Opinion 290, concerning The Princeton Community Phone Book reported at 97 N.J.L.J. 766 (1974), and Opinion 298 concerning The Little Yellow Book, reported at 98 N.J.L.J. 126 (1975). Those opinions were rendered and then officially suspended prior to the decisions in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976). The opinion of the U.S. Court of Appeals for the Third Circuit reversed this committee's Opinion 290 and, therefore, the restraints imposed by that opinion as well as by Opinion 298 have been removed.

Everett M. Scherer, Chairman
Advisory Committee on
Professional Ethics